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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1979

NO. 79-5269

ROBERT EDWARDS,

Petitioner,

-vs-

STATE OF ARIZONA,

Respondent.

ORIGINAL COPY

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

ROBERT K. CORBIN
Attorney General of
the State of Arizona

CRANE McCLENNEN
Assistant Attorney General
State Capitol Building
West Wing -- Second Floor
Phoenix, Arizona 85007

Attorneys for RESPONDENT

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QUESTIONS PRESENTED

I. WAS APPELLANT'S CONFESSION OBTAINED IN VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL?

II. WAS APPELLANT FORCED TO APPEAR AT TRIAL IN PRISON CLOTHES?

III. WAS DEFENSE TESTIMONY PROPERLY PRECLUDED FOR FAILURE TO MAKE TIMELY DISCLOSURE?

IV. WAS THERE IMPERMISSIBLE COMMENT ON APPELLANT'S FAILURE TO TESTIFY?

V. WAS APPELLANT DENIED HIS RIGHT TO A SPEEDY TRIAL?

STATEMENT OF THE CASE

On October 9, 1974, a robbery occurred at the LaConga Bar in Tucson. (R.T. of Apr. 21, 1977, at 15.) During the robbery, Carlos Mungia, the owner of the bar, died of a heart attack. (Id. at 17-20.) Mrs. Esparza, the only surviving witness, was never able to identify who the intruders were. (Id. at 22.)

By September 1975, the police had exhausted all of their possible leads. (R.T. of Apr. 21, 1975, at 118-19.) At that time, Cleveland (Kevin) Reed, who had been arrested on other charges, told the police that he could give them information about the LaConga robbery. (Id. at 106.) He was one of the individuals involved in the robbery, and gave the police all the details in exchange for a grant of immunity.

On January 19, 1976, the Tucson Police obtained a complaint charging appellant, Robert Edwards, and Willie Leroy Williams with the murder of Carlos Mungia and the robbery and burglary of the LaConga Bar. On January 23, 1976, the Pima County Grand Jury returned an indictment against Manuel Chiquete Soto, Willie Leroy Williams, and Willie Barefield aka Robert Edwards, charging them with the above crime. On March 5, 1976, Edwards' attorney filed a motion for redetermination of probable cause, based on the fact that the grand jury transcript had omitted from it the prosecuting attorney's explanation to the jury of the definition of murder. Soto and Williams joined in this motion. The state opposed this motion. The trial court ruled that the defendants had the right to have a full transcript of the grand jury proceeding, and that the omission deprived them of this right. It noted that it had no reason to believe that anything improper had been done by the county attorney. It nonetheless quashed the indictment.

The state then filed a motion of appeal and a motion to stay the proceedings in the superior court. On May 13, 1976, the Court of Appeals issued its opinion denying the special action. State v. Superior Court, 26 Ariz.App. 482, 549 P.2d 577 (1976). The opinion stated that there was no intimation that the county attorney had made any improper remarks, but denied the special action because there was no way of telling from the grand jury transcript what had transpired. 26 Ariz.

App. at 484, 549 P.2d at 579. The court denied rehearing on June 16, 1976, and the state filed a petition for review. On July 20, 1976, the Arizona Supreme Court denied the petition. This order was received by the Court of Appeals on July 26, 1976.

On July 30, 1976, Soto, Williams, and Edwards were reindicted under cause no. A-30683. Trial was set for September 28, 1976. On September 8, 1976, Williams' and Edwards' attorneys moved to continue the trial date so that they could prepare for the trial and find alibi witnesses. (R.T. of Sept. 8, 1976, at 7-18.) The state said that it was ready to go to trial on September 28, 1976, but otherwise took no position on the motion. (Id. at 8, 13.) The trial court granted the motion, and continued the trial to October 27, 1976. (Id. at 18-19.)

On September 7, 1976, Edwards' attorney filed a motion to dismiss on speedy trial grounds. On stipulation, hearing on this motion was continued. Williams' attorney filed a similar motion on September 14, 1976. Edwards joined in this motion.

Soto's attorney then filed a motion to sever. (R.T. of Sept. 22, 1976, at 2.) The trial court granted this motion. (Id. at 5.) Soto's attorney also filed a motion to dismiss on the basis of a denial of speedy trial. (Id.) Williams and Edwards did not join in the motion, but reserved the right to make the same motion at a later date. (Id. at 16.) The trial court denied Soto's motion to dismiss. (Id. at 18.)

Williams' and Edwards' attorneys then filed a motion to continue so that they could interview doctors who would be witnesses. (R.T. of Oct. 4, 1976, at 2, 5.) The state joined in the motion for the same reason, and also because of a schedule conflict. (Id. at 6.) The trial court granted the

motion, excluded the time, and continued the trial to approximately November 15, 1976. (Id. at 7.)

On October 5, 1976, Edwards' attorney filed a memorandum in support of his motion to dismiss on speedy trial grounds. The basis of this motion was the Rule 8 time limits from the January 19, 1976, arrest date, and the prejudice under the Sixth Amendment because he could not locate Delores Williams, Pat Brown, and Chenise Wilson, all of whom, it was claimed, would testify that Edwards was somewhere other than the LaConga Bar at the time of the robbery. Edwards' attorney also filed a motion to suppress his statements, and a motion for a mental examination.

The trial was subsequently set for November 15, 1976. (R.T. of Nov. 9, 1976, at 10.) Williams' and Edwards' attorneys again filed motions to continue on the basis that they were having trouble contacting Nellie Esparza, and trouble contacting expert witnesses who, it was hoped, would testify in their behalf. (R.T. of Nov. 16, 1976, at 3-4.) The trial court granted the motion and continued the trial to December 7, 1976. (Id. at 7.) The defendants then argued the motion to dismiss on speedy trial grounds. (Id. at 14-24.) The trial court denied this motion.

The trial court granted the motion for a mental examination. (R.T. of Nov. 16, 1976, at 46-47.) Because one of the doctors was not able to complete his examination by December 7, 1976, the trial court continued the trial to December 14, 1976. Again, the doctors were not able to complete their reports, and the Rule 11 hearing was continued to January 3, 1977. On that date, the trial court found both defendants competent to stand trial. (R.T. of Jan. 3, 1977, at 77.)

On January 4, 1977, Edwards filed an oral request, and Williams filed a written request, for new attorneys. (R.T. of Jan. 4, 1977 at 3, 6, 10.) Edwards' basis was that he did not think that his attorney had enough experience. (Id. at 8.) Williams' basis was that he felt there was a conflict between his attorney and himself, and that his attorney was not ready to go to trial. (Id. at 11-12.) The trial court denied these motions. (Id. at 37.) It did, however, conduct a hearing to determine whether the defendants were competent to waive counsel and defend themselves. (R.T. of Jan. 5, 1977, at 4.) The trial court determined that the defendants were competent, and appointed them as their own attorneys. (Id. at 87.) The trial court gave the defendant a waiver of counsel form to sign. (Id. at 99.) The defendants refused to sign them, claiming that they did not waive counsel, they only refused to be represented by their present attorneys. (Id. at 100, 104-05.) The trial court therefore reversed its decision to let defendants represent themselves. (Id. at 106-08.) The defendants' attorneys again urged the motion to dismiss for denial of speedy trial, arguing the same grounds as previously presented. (Id. at 130-31, 133, 141-43.) The trial court took the motion under advisement and ultimately denied it. (Id. at 156.)

Williams' and Edwards' attorneys then filed a special action challenging the ruling of the trial court refusing to allow defendants to represent themselves, and obtained an order staying the trial proceedings. The Court of Appeals indicated that it would lift the stay to allow the trial court to appoint new counsel. (R.T. of Jan. 18, 1977, at 4.) The trial court did so, and reset the trial for February 18, 1977. Williams' and Edwards' new attorneys then moved for a continuance on the basis that they needed more time to prepare for the trial.

(R.T. of Feb. 3, 1977, at 3-6.) The trial court granted the motion over the state's objection, and reset the trial for March 3, 1977. (Id. at 6, 13-14.) Williams' and Edwards' attorneys then filed another motion to continue on the grounds that they were having difficulty obtaining a suitable expert witness (the same reason that was urged in the November motion to continue). (R.T. of Nov. 16, 1976, at 3-4.) The trial court denied this motion. (R.T. of Feb. 28, 1977, at 11.) Williams and Edwards then filed motions to dismiss their new attorneys, and appoint new counsel. (R.T. of Mar. 2, 1977, at 2-3.) The grounds were that the attorneys had not adequate time to prepare the case. (Id. at 6-7; R.T. of Mar. 3, 1977, at 3.) The trial court then made a finding that the defendants were competent to represent themselves, and so appointed them. (R.T. of Mar. 2, 1977, at 50-51; R.T. of Mar. 3, 1977, at 65-68.) Williams then filed a motion to continue to obtain some out-of-state witnesses. (R.T. of Mar. 3, 1977, at 69-70.) Edwards stated that these witnesses had nothing to do with his case. (Id. at 85.) The trial court granted the motion over the state's objection, and reset the trial for March 11, 1977. (Id. at 73, 93-94.)

The trial court then heard Edwards' motion to suppress his statement to the police. (R.T. of Mar. 4, 7, 11, 1977, at 4.) Sergeant Bunting testified that he read Edwards his Miranda rights at the police station after his arrest on January 19, 1976. (Id. at 8.) Edwards stated that he understood his rights, and gave a tape-recorded statement, in which he gave an alibi. (Id. at 10-11.) Detective Hallums, who knew Edwards previously, then spoke to him, the result of which Edwards wanted to make a deal. (Id. at 12-13, 19-20, 58.) Bunting talked further with Edwards, who later said that he wanted to talk to an attorney before he made a deal. (Id. at 16-18,

20.) At this point the questioning stopped. (Id. at 21-22.) During this time, Edwards never said that he would not talk without an attorney present, and was apparently cooperative. (Id. at 27-31, 59.)

Detective Marmion, who was the lead detective on the case, testified that, the next day, he and Detective Milne went to talk to Edwards. (R.T. of Mar. 4, 7, 11, 1977, at 24-25, 40, 51.) Marmion knew that Bunting had spoken with Edwards, but he did not know what had been said, and further, Bunting had not told Marmion to speak to Edwards. (Id. at 24, 39-40.) Marmion again advised Edwards of his rights, and Edwards said first he wanted to hear the tape of Manny Soto's confession. (Id. at 46, 51.) After he heard about 10 to 12 minutes of the tape, Edwards said he would give a statement, but that he did not want it taped because he did not want it used against him. (Id. at 42-43, 51-53.) The officers made it very clear to Edwards that a verbal statement could be used against him in court. (Id. at 43-45, 52-54, 67-69.) Edwards then made an oral statement. (Id. at 53.)

On Friday, March 4, 1977, Edwards testified at the voluntariness hearing. At this time, he acknowledged making the taped exculpatory statement on January 19, 1976, but denied making the oral incriminating statement on January 20, 1976. (R.T. of Mar. 4, 7, 11, 1977, at 34-38.) On Monday, March 7, 1977, Edwards again testified. This time, he said that he asked for an attorney before he made the January 19 statement. (Id. at 73-74.) He further changed his story from the previous Friday, and now admitted that he made an oral statement on January 20, 1976. (Id. at 85-87.) His explanation for this inconsistency was that he had been "confused" on Friday. (Id. at 87, 91.) After argument, the trial court took the motion under advisement. (Id. at 114.)

Originally, the trial court granted Edwards' motion to suppress. (R.T. of Mar. 8, 11, 14, 16, 1977, at 37.) The trial court ruled that all of the statements were voluntary, and could be used in rebuttal. (Id.) It found that the officer's testimony was credible and that Edwards' was not. (Id. at 37-38.) It found that Edwards' statement on January 19, 1976, that he wanted to make a deal was an indication that he did not want to make a statement until he was represented by an attorney. (Id. at 38-39.) It further found that the questioning stopped at this point. (Id. at 39.) It then found that, the next day, Detective Marmion went to interview Edwards on his own initiative, without any compulsion or wrongdoing. (Id.) It held, however, that, once Edwards indicated on January 19, 1976, that he wanted an attorney, any further questioning of Edwards was a per se violation of Edwards' right to an attorney under Miranda, whether or not the officer knew of the request for an attorney. (Id. at 39-40.) The basis for this ruling was State v. Sauve, 112 Ariz. 576, 544 P.2d 1091 (1976). (Id. at 40.)

The following Monday, the state provided the trial court with the case of State v. Travis, 26 Ariz.App. 24, 545 P.2d 986 (1976). (R.T. of Mar. 8, 11, 14, 16, 1977, at 55-56.) The trial court noted that it had not considered the Travis case when it ruled on the motion to suppress, and that it found that the Travis case was directly on point. It therefore reversed its ruling, and found the statements admissible. (Id. at 64-65.)

Edwards then moved to sever his trial from that of Williams. (R.T. of Mar. 8, 11, 14, 16, 1977, at 83.) The trial court granted this motion. (Id. at 99.) The trial ultimately ended when the trial court declared a mistrial because the jurors were unable to reach a unanimous verdict.

Edwards' second trial began April 20, 1977. Prior to the start of the trial, Edwards informed the trial court that his civilian clothes had either been stolen or misplaced. (R.T. of Apr. 20, 1977, a.m., at 1-9 to 1-10.) He did not, however, ask for a continuance, nor did he refuse to go to trial in the clothes he was wearing. (Id.) The trial court ordered the sheriff to make every effort to find the missing clothes, and report back to the court. (Id. at 1-10.) That afternoon, Edwards again raised the matter of his clothes. (R.T. of Apr. 20, 1977, p.m., at 72.) Edwards' attorney informed the trial court that he had called the sheriff's office right after the trial court had entered its order that morning, and that the sheriff's office had initiated the search immediately. (Id. at 73-74.) Edwards' attorney said that he would check with the sheriff's office that evening, and, if the clothes had not been found, would try to find some other clothes for Edwards. (Id. at 74.) No further mention was made of clothes after that, nor does the record indicate what Edwards was wearing after that.

On April 21, 1977, testimony began. Nellie Esparza testified about what happened at the LaConga Bar on October 9, 1974. Mrs. Esparza never said on direct what race the intruders were, but Edwards, on cross-examination brought out the fact that they were black. (R.T. of Apr. 21, 1977, at 22, 28-29, 42.) Officer Larry Bunting then testified about the arrest of Edwards on January 19, 1976, and the statement that he made that night. (Id. at 62, 67.) Upon cross-examining Officer Bunting, Edwards made the statement that he had been put in solitary, a fact which Officer Bunting had not given in his testimony. (Id. at 93.)

Detective Marmion then testified including testimony about the confession Edwards made on January 20, 1976. (Id. at

109-12.) Again, on cross-examination, in asking his questions, Edwards stated facts that had not come out in the testimony. (Id. at 125, 128.) Cleveland (Kevin) Reed then testified, and said that he and Edwards were the ones who robbed the LaConga Bar. (Id. at 152, 155, 157-59.) Again, Edwards talked about himself and his role in the robbery when asking questions on cross-examination. (Id. at 173, 178-79.)

On April 22, 1977, Edwards' attorney notified the state that Edwards wanted to subpoena Frenchy Campbell, an inmate in the County Jail, as an alibi witness. (R.T. of Apr. 22, 1977, at 3-6.) The state objected to this untimely disclosure. (Id.) The trial court reserved ruling on this. (Id. at 3-7.)

The state then called Oletha Delores Williams Hunter, Edwards' common-law wife and alibi witness. (R.T. of Mar. 24, 28, 1977, at 4-19 to 4-24, 4-34; R.T. of Apr. 21, 1977, at 93, 191; R.T. of Apr. 22, 1977, at 3-10 to 3-12, 3-16 to 3-17.) She testified that Cleveland Reed, Edwards, and her brothers Willie and Albert Williams came over to her house at about 3:00 a.m. the night of the LaConga Bar robbery. (R.T. of Apr. 22, 1977, at 3-12 to 3-15.) Reed and Edwards then began arguing about money. (Id. at 3-13.) This corroborated Cleveland Reed's testimony. (R.T. of Apr. 21, 1977, at 162.) Prior to their arrival, she had been alone there with her children. (R.T. of Apr. 22, 1977, at 3-15.) Edwards again cross-examined this witness using facts that had not been brought out, and would only have been known to him. (Id. at 3-17 to 3-19.)

Dr. Brucker then testified that Mr. Mungia died of a heart attack. (R.T. of Apr. 22, 1977, at 3-39 to 3-43.) He further testified that the heart attack was precipitated by the "fight, flight, fright" syndrome caused when the intruders put the gun

to Mr. Mungia's head, and made him open the safe. (Id. at 3-47 to 3-49.)

The trial court then considered the question of allowing Frenchy Campbell to testify as an alibi witness. The county attorney had interviewed Mr. Campbell, and had come to the conclusion that he was not able to give any testimony about Edwards' whereabouts at the time of the robbery. (R.T. of Apr. 22, 1977, at 3-131, 3-187.) Edwards informed the trial court that Mr. Campbell would testify that he was extremely intoxicated the night of the robbery, and that he had not been listed earlier because he had had hepatitis, and could not come to the courthouse. (Id. at 3-188 to 3-191.) The trial court said it would hear an offer of proof the following Monday. (Id. at 3-191.)

The following Monday, the offer of proof showed that Mr. Campbell would not give any alibi statements, but would instead give testimony supporting an intoxication defense, a defense that had not previously been disclosed. (R.T. of Apr. 25, 1977, at 4-4, 4-7 to 4-8.) Edwards again said this witness had not been disclosed at the first trial because he had had hepatitis. (Id. at 4-11.) The trial court found that the witness had not been timely disclosed, and imposed the sanction of precluding his testimony. (Id. at 4-12 to 4-13.)

After Edwards had presented his evidence, and the parties were about to give their closing arguments, the state asked the trial court to admonish Edwards not to argue to the jury about the death penalty and "fighting for his life" as Edwards had done at the first trial, and asked the trial court to instruct Edwards that he must confine his argument to facts in evidence. (R.T. of Apr. 26, 27, 1977, at 5-83.) Edwards had been previously told this by the trial court. (R.T. of Mar. 17, 18, 1977, at 1-11.) Edwards said that he agreed with

this, and said that he knew that he could not argue what was not in evidence. (R.T. of Apr. 26, 27, 1977, at 5-84.) The trial court, however, granted the state's motion to admonish Edwards. (Id.)

Upon commencing his closing argument, the state's attorney wrote on the easel "Defendant confessed." (R.T. of Apr. 26, 27, 1977, at 5-85, 5-166.) He asked the jury to remember in particular the testimony of Detective Marmion, Detective Milne, and Sergeant Bunting in that regard. (Id. at 5-85.) After the state's attorney had concluded, Edwards wrote on the easel "Defendant did not confess." (Id. at 5-97, 5-166.) Edwards then argued to the jury that, because Marmion and Milne only gave testimony of an oral confession, and had no evidence of a written confession, the jury should take that to mean that Edwards did not confess, and should "take that into what we call into consideration, into evidence." (Id. at 5-111, 5-127, 5-128.) Later, he said "[a]s you heard in my statement, I was at a party," referring to the taped statement. (Id. at 5-115.) He then discussed his alibi explanation, many of the facts of which he had provided to the jury while questioning his witness. (Id. at 5-115 to 5-116; 5-40 to 5-42, 5-45 to 5-46, 5-48.) He again told the jury that his defense was that he was not there at the time. (Id. at 5-118, 5-134 to 5-135.) He made further references to statements he had made and explanations he had made, and denied making the confession of January 20, 1976. (Id. at 5-124, 5-126 to 5-128.) Additionally, Edwards disregarded the trial court's admonishment and, on two occasions, told the jury that he was facing the death penalty. (Id. at 5-119, 5-120, 5-137.)

In his final argument, the state pointed out to the jury that no witness had taken the stand and given evidence that Edwards did not confess. (R.T. of Apr. 26, 27, 1977, at 5-138

5-139.) Edwards' attorney then made a motion for a mistrial based upon the reasoning that Edwards was the only one who could have given evidence that he did not confess, and that this statement called to the jury's attention the fact that Edwards did not take the stand in his own behalf. (Id. at 5-139.) The trial court denied this motion. (Id. at 5-140.) The state's attorney made further comments, and again Edwards' attorney moved for a mistrial. (Id. at 5-143 to 5-144, 5-147 to 5-148.) The trial court again denied the motion. (Id. at 5-148.)

The jury ultimately found Edwards guilty of all three counts. The trial court subsequently sentenced Edwards to death. The Arizona Supreme Court affirmed the conviction, but remanded the case to the trial court for another mitigation hearing. State v. Edwards, 122 Ariz. 206, 594 P.2d 72 (1979). After this hearing, the trial court sentenced Edwards to life in prison. This petition followed.

JURISDICTIONAL STATEMENT

Petitioner claims a deprivation of the rights guaranteed under the Fifth, Sixth, and Fourteenth Amendment, and seeks review pursuant to 28 U.S.C. § 1257(3).

ARGUMENT

I

PETITIONER WAIVED HIS SIXTH AMENDMENT RIGHT TO AN ATTORNEY PRIOR TO QUESTIONING.

Petitioner contends that his confession was taken in violation of his Sixth Amendment right to be represented by an attorney. The circuits that have addressed this issue have held that, once an accused has indicated that he wishes to consult an attorney prior to questioning, there is per se rule that prohibits further contact with the accused, and that the accused may make a subsequent, valid

waiver of counsel. United States v. Hauck, 586 F.2d 1296 (8th Cir. 1978), cert. denied, ___ U.S. ___, 99 S.Ct. 2170, 60 L.Ed.2d 1050 (1979); White v. Finkbeiner, 570 F.2d 194 (7th Cir. 1978); United States v. Rodriguez-Gastelum, 569 F.2d 482 (9th Cir.)(en banc), cert. denied, 436 U.S. 919 (1978); United States v. Grant, 549 F.2d 942 (4th Cir.), cert. denied, 432 U.S. 908 (1977); United States v. Pheaster, 544 F.2d 353 (9th Cir. 1976), cert.denied sub nom. Inciso v. United States, 429 U.S. 1099 (1977); United States v. Clark, 499 F.2d 802 (4th Cir. 1974); United States v. Hodge, 487 F.2d 945 (5th Cir. 1973); see United States v. Charlton, 565 F.2d 86 (6th Cir. 1977), cert. denied, sub nom. Jacek v. United States, 434 U.S. 1070 (1978). In this case, petitioner said that he did not want to discuss a deal without first talking to an attorney. The police immediately stopped questioning him. The next morning, two other officers (who did not know about the previous request) went to see petitioner. They played for petitioner a taped statement by Manny Soto where he said that petitioner had done the killing. Petitioner then indicated that he would make a statement. The officers first readvised petitioner of his rights, which he acknowledged. The trial court and the Arizona Supreme Court were therefore correct in determining that there had been a valid waiver of counsel.

Petitioner contends that there is a split in the circuits on this point, citing United States v. Rodriguez-Gastelum, supra, Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979)(en banc), and United States v. Priest, 409 F.2d 491 (5th Cir. 1969). In Priest, a 19-year-old with an 8th grade education requested an attorney. The police ignored the request, and continued their interrogation.

The court there held that there was no waiver of the rig to an attorney. In Nash, there was an equivocable request for an attorney, whereupon the assistant district attorney asked some clarifying questions, and the suspect then gave a statement. The majority reaffirmed the rule in Priest that the interrogation must cease once thee has been an unequivocable request for an attorney, but held that the inquiry may continue if there has been an equivocable request. The dissent noted that, once there has been an unequivocable request for an attorney, the police may come back and ask the suspect if he has changed his mind if there has been a temporal break in the custodial interrogation after the request for counsel. 597 F.2d at 520 n.2. In Rodriguez-Gastelum, the question was identical to that in Nash: May the inquiry continue in the face of an equivocable request for an attorney. The court then went on, however, to hold that, once the suspect has made an unequivocable request for an attorney, there is no per se rule prohibiting further statements by the suspect, and therefore the suspect can change his mind and waive his right to an attorney.

It seems, then, that there is no conflict in the circuits: All agree that, once a suspect has invoked his right to an attorney, there is no per se rule that prohibits a confession in the future. Once a suspect has invoked this right, however, the government has a heavy burden in showing that the suspect made a voluntary waiver of this right previously invoked. The only difference between the circuits seems to be what will be a sufficient showing that there was a voluntary waiver. In the present case, petitioner's confession would be held admissible under any of the tests adopted. As petitioner concedes,

his confession would be held admissible under the Ninth Circuit test set forth in Rodriquez-Gastelum. But the confession would also be admissible under the Fifth Circuit test in Nash because there was a temporal break between the request for counsel and the purported waiver. Since petitioner would not prevail under either test, should this court desire to settle any inconsistencies in the different tests, this would not be the case to do so because no relief could be granted. Moreover, this Court presently has before it a case dealing with a confession after an assertion of the right to counsel. State v. Innis, ___ R.I. ___, 391 A.2d 1158 (1978), cert. granted, 440 U.S. 934 (1979). A decision in that case may clear up any ambiguities presently existing.

ARGUMENT

II

THE RECORD DOES NOT REFLECT THAT PETITIONER WAS FORCED TO STAND TRIAL IN PRISON GARB.

Petitioner contends that he was forced to stand trial in prison garb. The rule in this area is well-settled by Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976), and does not need further amplification by this Court. The Arizona Supreme Court found that the record was silent on this particular issue. 122 Ariz. at 215, 594 P.2d at 81. Since petitioner would still have a state remedy available under Rule 32, Arizona Rules of Criminal Procedure, respondent submits that it would be proper to have petitioner exhaust his state remedies before consideration of this issue by federal courts.

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ARGUMENT

III

THE TRIAL COURT PROPERLY PRECLUDED PETITIONER'S WITNESS FOR FAILURE TO MAKE TIMELY DISCLOSURE.

Petitioner contends that it was improper for the trial court to preclude the testimony of Frenchy Campbell. This Court has held that preclusion is permissible if it is reciprocal. Waridus v. Oregon, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973); Williams v. Florida, 399 U.S. 28, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970). Rule 15, Arizona Rules of Criminal Procedure, provides such reciprocal sanctions. In this case, petitioner wanted to present the testimony of Frenchy Campbell, who purportedly was at the same party as petitioner on the night of the murder 3 years before, and coincidentally happened to run into petitioner while they were both inmates at the Pima County Jail. Although petitioner contended that Frenchy Campbell would be an alibi witness, Campbell could only testify that petitioner was intoxicated at 6:00 p.m., which was 7 hours prior to the time of the killing. In light of the failure to disclose this intoxication defense, the trial court was correct in precluding this witness. And, in light of the fact that Campbell could only testify that petitioner was intoxicated at 6:00 p.m., while Oletha Delores Williams Hunter testified that she picked up petitioner at the party at 6:00 p.m. and was able to testify about the extent of petitioner's intoxication, the Arizona Supreme Court was correct in concluding that there was no prejudice.

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ARGUMENT

IV

THE PROSECUTING ATTORNEY DID NOT IMPROPERLY COMMENT ON THE FAILURE OF PETITIONER TO TAKE THE WITNESS STAND.

Petitioner contends that the prosecuting attorney improperly commented on his failure to take the witness stand, as is prohibited by Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). The Arizona Supreme Court concluded that any improper comment by the prosecuting attorney was invited by petitioner's closing argument stating facts not supported by the testimony. The record reflects that the Arizona Supreme Court was correct in this conclusion.

Petitioner attempts to characterize the decision of the Arizona Supreme Court as somehow based upon the fact that petitioner represented himself. A careful reading of the opinion shows that this was not the case; the same result would have been reached whether petitioner or an attorney made the improper remarks.

There was, however, a further argument by the state based upon the fact that petitioner represented himself that the Arizona Supreme Court did not utilize in its opinion, but that this Court would have to face if it chose to grant this petition. Griffin holds that the state and the trial court cannot draw adverse inferences from the exercise by a defendant of his right to remain silent. But in the present case, petitioner did not remain silent. All the while he cross-examined witnesses, he continually presented facts, not from the mouths of the witnesses, but instead from his own mouth while he asked the questions. Petitioner in effect testified without having to subject himself to cross-examination. Because he did not remain

silent, the comments by the prosecutor were not a comment on the exercise of his right to remain silent. To reverse on this issue would mean the conclusion that the jurors had failed to notice the petitioner had failed to testify, and only became aware of this fact when the prosecuting attorney brought it out in rebuttal. This would be an assumption even more doubtful than the doubtful assumption rejected by this Court in Lakeside v. Oregon, 435 U.S. 333, 339-40, 98 S.Ct.1091, 1095, 55 L.Ed.2d 319, 325-26 (1978).

This does not mean that a defendant would be penalized for exercising his right to represent himself under Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). If a defendant asked questions the way an attorney would, that is, no attempt to testify at the same time, there would be no comment permitted by the prosecuting attorney. It would only be in situations where the defendant used his right of self-representation as a means of being able to testify without being subject to cross-examination that the prosecutor would be given the right to comment on the fact that the defendant has given only a partial explanation, not a full one.

ARGUMENT

V

PETITIONER WAS NOT DENIED HIS RIGHT TO A SPEEDY TRIAL.

Petitioner contends that he was denied his right to a speedy trial. The test in this area is plainly set forth in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). Under this test, the Arizona Supreme Court noted that the delay was 14 months, but that only 4 of these months was due to the state. It found that the 4 month delay was proper, and was caused by a good faith

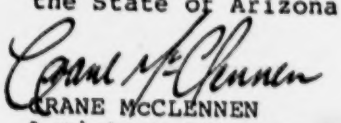
attempt by the state to litigate its rights. It found that petitioner asserted his right to a speedy trial, although the respondent disagrees with this conclusion. Finally, on the most important issue, the Arizona Supreme Court found that petitioner was not prejudiced by the 14 month total delay, and was certainly not prejudiced by the 4 month delay caused by the state. Petitioner was therefore not denied his right to a speedy trial.

CONCLUSION

Based upon the foregoing authorities and arguments, respondent respectfully requests that this Court deny this petition.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General of
the State of Arizona



CRANE McCLENNEN
Assistant Attorney General

Attorneys for RESPONDENT